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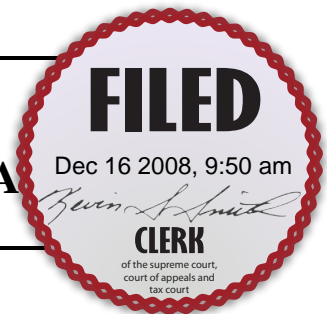
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**IN THE
COURT OF APPEALS OF INDIANA**



IN THE MATTER OF THE TERMINATION)
OF THE PARENT-CHILD RELATIONSHIP)
OF A.C., MINOR CHILD, AND HER MOTHER,)
BONITA CUSHENBERRY,)

BONITA CUSHENBERRY,)

Appellant/Respondent,)

vs.)

MARION COUNTY DEPARTMENT OF)
CHILD SERVICES,)

Appellee/Petitioner,)

and)

CHILD ADVOCATES, INC.,)

Co-Appellee (Guardian ad Litem).)

No. 49A02-0806-JV-487

APPEAL FROM THE MARION SUPERIOR COURT

The Honorable Larry Bradley, Magistrate
The Honorable Marilyn A. Moores, Judge
Cause No. 49D09-0704-JT-15591

December 16, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Respondent Bonita Cushenberry (“Mother”) appeals the involuntary termination of her parental rights to her daughter, A.C. On appeal, Mother claims that there is insufficient evidence supporting the juvenile court’s judgment terminating her parental rights. Concluding that there is clear and convincing evidence supporting the juvenile court’s judgment, we affirm.

FACTS AND PROCEDURAL HISTORY

Mother is the biological mother of A.C., born on November 16, 2002.¹ On May 25, 2006, the Marion County Department of Child Services (“MCDCS”) investigated a referral alleging Mother had stolen her mother’s (“Grandmother”) car and left then three-year-old A.C. with Grandmother, who was unable to care for A.C. because Grandmother was deaf and partially paralyzed. MCDCS took A.C. into protective custody and filed a petition requesting temporary custody of A.C. The following day, MCDCS also filed a petition alleging A.C. was a child in need of services (“CHINS”). MCDCS based its CHINS petition on the incident that had occurred the day before, as well as an allegation by Grandmother that Mother had a substance abuse problem but was not receiving treatment.

This was not MCDCS’s first involvement with Mother. In November 2002, three days after A.C. was born, MCDCS filed a petition alleging A.C. was a CHINS because of

¹ A.C.’s biological father is unknown and does not participate in this appeal.

drug exposure. Mother admitted to the allegations of the CHINS petition, and A.C. was subsequently removed from Mother's care pursuant to a dispositional order. A.C. was placed in relative care with her maternal grandfather ("Grandfather"), and Mother began participating in a drug rehabilitation program. In April 2003, A.C. was returned to Mother's care for a temporary in-home trial visit, and on August 1, 2003, the juvenile court issued an order granting MCDACS's request that the CHINS case be closed.

At the initial hearing on the CHINS petition in the instant case, the juvenile court found that there was probable cause to believe A.C. was a CHINS and issued an order making A.C. a temporary ward of the State. A fact-finding hearing on the CHINS petition was subsequently held on September 5, 2006. Mother was present and represented by counsel. At the conclusion of the fact-finding hearing, the juvenile court found that reasonable efforts had been offered to Mother to eliminate the need for A.C.'s removal from her care, but that such efforts had not been effective. Consequently, following a ruling hearing held on September 21, 2006, the juvenile court found A.C. to be a CHINS.

On October 17, 2006, a dispositional hearing was held after which the juvenile court issued an order formally removing A.C. from Mother's care and custody. The dispositional order also required Mother to participate in a variety of services and to complete certain tasks in order to achieve reunification with A.C. Mother was ordered to, among other things: (1) secure and maintain a stable and legal source of income; (2) obtain and maintain suitable housing; (3) enroll and participate in any and all assessments or programs ordered within thirty days of said order; (4) maintain weekly contact with

MCDCS caseworkers; (5) complete age-appropriate parenting classes; (6) participate in a drug and alcohol assessment and successfully complete any resulting recommended substance abuse treatment program; (7) refrain from the use of non-prescription drugs and submit to random drug screens; and (8) exercise regular visitation with A.C. as recommended by MCDCS.

Mother's compliance with court orders throughout the duration of the CHINS proceedings was inconsistent. Mother initially completed both a parenting and substance abuse assessment in November 2006, and she began participating in supervised visitation. Mother failed to appear, however, for an initial random drug screen referral that was made on October 25, 2006. The referral eventually expired. Mother's visitation with A.C. was also suspended by the juvenile court in January 2007, due to Mother's non-participation, and was not reinstated until October 2007. Meanwhile, in March 2007, Mother gave birth to another child, whom she gave up for adoption because she had been using marijuana and cocaine throughout the pregnancy and because the child was conceived as a result of Mother having been raped. Shortly thereafter, in April 2007, Mother entered an intensive outpatient drug rehabilitation program ("IOP") at Gallahue Mental Health. This dual diagnosis treatment program was designed to address both Mother's depression and substance abuse problems.

On April 17, 2007, MCDCS filed a petition for the involuntary termination of Mother's parental rights to A.C. A pretrial hearing on the termination petition was held on July 18, 2007; however, at the hearing, MCDCS requested that the fact-finding hearing be delayed for 90-120 days due to Mother's recently renewed and successful

participation in services. The juvenile court granted MCDCS's request and the fact-finding hearing was set for October 29, 2007. On October 24, 2007, the juvenile court granted a second motion to continue the termination hearing, made by MCDCS, due to Mother's successful completion of the IOP and her recent employment. The juvenile court granted MCDCS's request, and the fact-finding hearing was re-set for February 4, 2008. On January 29, 2008, the juvenile court granted yet a third motion to continue, this time made at the request of Mother.

A two-day fact-finding hearing on the termination petition eventually commenced on April 3, 2008, and was concluded on April 9, 2008. Mother was present and represented by counsel. At the hearing, MCDCS presented evidence that Mother had still not completed court-ordered services. Specifically, MCDCS family case manager Caralee Jones ("Jones") testified that Mother had been referred for random drug screens on three separate occasions throughout the CHINS proceedings, but that Mother had failed to enroll in the program or submit to regular drug screens, even after her completion of the IOP at Gallahue Mental Health, until after the final referral was made on March 25, 2008. At the time of the termination hearing, Mother had produced two negative screens. Jones also informed the court that Mother's housing and employment situations were unstable and that Mother had missed at least five scheduled visitations with A.C. since visitation was reinstated in October 2007.

Home-based counselor Reverend Ralph Spears ("Spears") also testified at the termination hearing. Although Spears acknowledged Mother's recent significant improvements, he nevertheless admitted to having ongoing concerns regarding Mother's

risk of relapse, as well as having concerns pertaining to Mother's anger management, housing, and transportation issues. As a result of his concerns, Spears felt it was still not yet appropriate for A.C. to be returned to Mother's care. Finally, Suellen Sampson ("Sampson"), A.C.'s Guardian ad Litem ("GAL"), in recommending termination of Mother's parental rights, testified that she had continuing concerns regarding Mother's history of substance abuse and risk of relapse. Sampson further testified that she felt returning A.C. to Mother would be "very traumatic" for A.C. Tr. p. 233.

At the conclusion of the fact-finding hearing, the juvenile court took the matter under advisement. On April 21, 2008, the court issued its judgment terminating Mother's parental rights to A.C. This appeal ensued.

DISCUSSION AND DECISION

Mother challenges the sufficiency of the evidence supporting the juvenile court's judgment terminating her parental rights to A.C. In so doing, Mother claims MCDCS failed to establish by clear and convincing evidence either (1) that there is a reasonable probability the conditions resulting in A.C.'s removal from her care and custody will not be remedied, or (2) that continuation of the parent-child relationship poses a threat to A.C.'s well-being.

Initially, we note our standard of review. This court has long had a highly deferential standard of review in cases concerning the termination of parental rights. *In re K.S.*, 750 N.E.2d 832, 836 (Ind. Ct. App. 2001). When reviewing the juvenile court's judgment, we will not reweigh the evidence or judge the credibility of the witnesses. *In re D.D.*, 804 N.E.2d 258, 264 (Ind. Ct. App. 2004), *trans. denied*. Instead, we consider

only the evidence and reasonable inferences therefrom that are most favorable to the judgment. *Id.*

Here, the juvenile court made specific findings in ordering the termination of Mother's parental rights. Where the juvenile court enters specific findings of fact, we apply a two-tiered standard of review. First, we must determine whether the evidence supports the findings, and second, we determine whether the findings support the judgment. *Bester v. Lake County Office of Family & Children*, 839 N.E.2d 143, 147 (Ind. 2005). In deference to the juvenile court's unique position to assess the evidence, we will set aside the court's judgment terminating a parent-child relationship only if it is clearly erroneous. *In re L.S.*, 717 N.E.2d 204, 208 (Ind. Ct. App. 1999), *trans. denied*; *see also Bester*, 839 N.E.2d at 147. A finding is clearly erroneous when there are no facts or inferences drawn therefrom that support it. *D.D.*, 804 N.E.2d at 264. A judgment is clearly erroneous only if the findings do not support the trial court's conclusions or the conclusions do not support the judgment thereon. *Quillen v. Quillen*, 671 N.E.2d 98, 102 (Ind. 1996).

"The traditional right of parents to establish a home and raise their children is protected by the Fourteenth Amendment of the United States Constitution." *In re M.B.*, 666 N.E.2d 73, 76 (Ind. Ct. App. 1996), *trans. denied*. However, the juvenile court must subordinate the interests of the parents to those of the child when evaluating the circumstances surrounding the termination. *K.S.*, 750 N.E.2d at 837. Parental rights may be terminated when the parents are unable or unwilling to meet their parental responsibilities. *Id.* at 836.

In order to terminate a parent-child relationship, the State is required to allege and prove that:

- (A) one (1) of the following exists:
 - (i) the child has been removed from the parent for at least six (6) months under a dispositional decree;
 - (ii) a court has entered a finding under IC 31-34-21-5.6 that reasonable efforts for family preservation or reunification are not required . . . ;
 - (iii) the child has been removed from the parent and has been under the supervision of a county office of family and children for at least fifteen (15) months of the most recent twenty-two months;
- (B) there is a reasonable probability that:
 - (i) the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied; or
 - (ii) the continuation of the parent-child relationship poses a threat to the well-being of the child;
- (C) termination is in the best interests of the child; and,
- (D) there is a satisfactory plan for the care and treatment of the child.

Ind. Code § 31-35-2-4(b)(2) (2006). The State must establish each of these allegations by clear and convincing evidence. *Egley v. Blackford County Dep't of Pub. Welfare*, 592 N.E.2d 1232, 1234 (Ind. 1992).

Mother's sole allegation on appeal challenges the sufficiency of the evidence supporting the juvenile court's findings pertaining to subsection (B) of the termination statute set forth above. Specifically, Mother argues that the "bulk of the evidence relied upon by the trial court focuse[s] on Mother's past transgressions in 2002, without considering the substantial progress Mother had made on the final day of trial." Appellant's Br. p. 7. Mother further argues that by completing an IOP and receiving a certificate of achievement she had "addressed the initial concern regarding her substance

abuse” by the time of the termination hearing and thus “did not pose a ‘threat’ to the well-being of [A.C.]” *Id.* at 8. Mother therefore asserts that insufficient evidence was presented to justify termination of her parental rights.

Initially, we observe that Indiana Code section 31-35-2-4(b)(2)(B) is written in the disjunctive. Thus, it requires the juvenile court to find that only one of the two requirements of subsection (B) have been established by clear and convincing evidence. *See L.S.*, 717 N.E.2d at 209. Accordingly, we shall first determine whether clear and convincing evidence supports the juvenile court’s finding that there is a reasonable probability the conditions resulting in A.C.’s removal from Mother’s care will not be remedied.

When determining whether a reasonable probability exists that the conditions justifying a child’s removal or continued placement outside the home will not be remedied, the juvenile court must judge a parent’s fitness to care for his or her child at the time of the termination hearing, taking into consideration evidence of changed conditions. *In re J.T.*, 742 N.E.2d 509, 512 (Ind. Ct. App. 2001), *trans. denied*. However, the court must also “evaluate the parent’s habitual patterns of conduct to determine the probability of future neglect or deprivation of the child.” *Id.* Pursuant to this rule, courts have properly considered evidence of a parent’s prior criminal history, drug and alcohol abuse, history of neglect, failure to provide support, and lack of adequate housing and employment. *A.F. v. Marion County Office of Family & Children*, 762 N.E.2d 1244, 1251 (Ind. Ct. App. 2002), *trans. denied*. The juvenile court may also properly consider the services offered to the parent by the county department of child

services, and the parent's response to those services, as evidence of whether conditions will be remedied. *Id.* Moreover, the county department of child services (here, MCDCS) is not required to provide evidence ruling out all possibilities of change; rather, it need establish only that there is a reasonable probability that the parent's behavior will not change. *In re Kay L.*, 867 N.E.2d 236, 242 (Ind. Ct. App. 2007).

In determining that there is a reasonable probability the conditions resulting in A.C.'s removal and continued placement outside of Mother's care will not be remedied, the juvenile court made the following pertinent findings:

4. The Court ordered services for [Mother] to complete toward reunification. Between October 2006 and April 2007, [Mother] completed initial assessments and no other services. Supervised visitation was referred in October 2006[,] but was suspended as a result of [Mother's] failure to show up at the visitation sessions.
5. In April 2007, [Mother] entered an outpatient treatment program at Gallahue Mental Health to address her dual diagnosis of substance abuse and mental health issues. Although some sessions of the program were missed, [Mother] completed the program in October 2007.
6. Upon completion of the Gallahue program, a referral was made to Mosaic Recovery for random drug screens. [Mother] failed to enroll with Mosaic and the referral expired. Another referral was made on March 25, 2008[,] and MCDCS had received two results by April 9, 2008.
7. Supervised visitation between [A.C.] and [Mother] was re-referred in October 2007 and is ongoing. Five visitation sessions have been missed in 2008.
8. [Mother] has a history of employment as a waitress. Since the initiation of the CHINS action, she has had three different full[-]time jobs, each lasting six months.
9. Although [Mother] works full[-]time and has lived in [Grandfather's] house rent free, she has been unable at times to maintain the utilities, has requested money from [Grandfather], and has used the services of food pantries.
10. Home[-]based counseling was commenced in October 2007 with Reverend Ralph Spears. Reverend Spears felt [Mother] had made

progress but did not feel it to be appropriate to place [A.C.] with [Mother] at this time due to housing and transportation issues. Reverend Spears also had concerns about substance abuse relapse, anger control, missed appointments[,] and a failure to follow through with plans on the part of [Mother].

11. There is a reasonable probability that the conditions that resulted in [A.C.'s] removal and continued placement outside the home will not be remedied.

A. [Mother] has a history of cocaine and marijuana abuse. [A.C.] was the subject of a CHINS proceeding in 2002 after [Mother] admitted to testing positive for cocaine and marijuana at the time of [A.C.'s] birth. That CHINS was closed after [Mother] completed a substance abuse treatment program. In 2007, [Mother] gave birth to a child that she put up for adoption as a result of her being on drugs and being raped. Although a substance abuse program was completed, [Mother] has not consistently followed through with weekly screens through Mosaic to monitor her sobriety. At this point in time, it is uncertain whether [Mother] can remain clean.

B. [Mother] is still unable to care for [A.C.] due to stability issues. She has plans to obtain housing but has not presented evidence that she is financially able to do so at this time. [Grandfather] has requested that [Mother] leave her current residence which [Grandfather] owns. Within the last year[,] [Mother] has been convicted of resisting arrest and has also been placed on house arrest. There were consequences when she argued with her probation officer, and during the trial in this matter, she had to be removed from the courtroom due to her disruptive outbursts. According to Reverend Spears, [Mother] has not taken her Wellbutrin since August 2007 and is calmer with it. [Mother's] lack of attention to her mental health issues have added to her instability.

C. The CHINS proceeding has now been pending over twenty-one (21) months and [Mother] would still need to find appropriate housing, complete drug screens, consistently visit with [A.C.], and successfully complete home[-]based counseling for reunification to occur. Due to the lack of consistent participation in services to this point, it is unlikely that [Mother] will be successful at services if given additional time. An October 2007 trial setting was continued based upon [Mother's] efforts at services but was reset after missed visits, lack of participation in drug screens[,] and subsequent legal problems.

Appellant's App. pp. 11-13. The evidence most favorable to the judgment supports these findings, which in turn support the juvenile court's ultimate decision to terminate Mother's parental rights to A.C.

The reasons for A.C.'s initial removal in 2006 was Mother's neglectful conduct in leaving A.C. in the care of Grandmother who was deaf, partially paralyzed, and unable to properly care for A.C., coupled with the allegation that Mother continued to struggle with her addiction to illegal drugs. A.C.'s continued placement outside of Mother's care was the result of Mother's failure to participate in and successfully complete court-ordered services. At the time of the termination hearing, these conditions had still not been remedied, and Mother's ability to provide A.C. with a safe, stable, and nurturing home environment remained unclear.

The record reveals that, at the time of the termination hearing, Mother had missed approximately five scheduled appointments since the juvenile court's reinstatement of visitation in October 2007. Mother had also failed to pay for any of the court-ordered child support, failed to maintain regular contact with MCDCS, and failed to complete home-based counseling. Also significant, is the fact that although Mother had successfully completed an IOP, Mother's ability to maintain her sobriety remained in question.

Mother has been battling her addiction to illegal substances since at least as far back as 2002, when three-day-old A.C. was removed from her care due to drug exposure. Despite having successfully completed a substance abuse program in 2003 in a former

CHINS case, Mother nevertheless admitted during the termination hearing in the present case that she had used marijuana and/or cocaine throughout 2006 and 2007, including throughout her second pregnancy. In addition, Mother's refusal to enroll and participate in a random drug screen program until just prior to the termination hearing provides further support for the juvenile court's concern about Mother's ability to remain "clean." Appellant's App. p. 12.

Finally, the record further reveals that Mother had only been working for her current employer for approximately one month, that she had failed to hold any job throughout the CHINS proceeding for more than six months, and that she had been unable to obtain new housing, despite repeated requests by Grandfather to move out of the house that he owned, in large part due to insufficient financial resources.

When questioned as to whether she believed Mother should be given more time to complete services, Jones replied:

[A.C.] needs to know who's going to provide for her and she needs to be in a safe, stable environment, free from physical abuse[,] and drug abuse, and neglect. In the two years that this case has been open, [Mother] has not demonstrated . . . that she can provide that safe and stable environment for [A.C.].

Tr. p. 214. Similarly, Reverend Spears testified that he had continuing concerns regarding Mother's potential for relapse, especially in light of her admission to him that she had used crack in the past. Reverend Spears was also worried about Mother's inability to control her anger at times, her housing instability, and her recent car troubles that had left her without transportation. When asked, "[H]ave you ever reached the

decision that it's appropriate to place [A.C.] back into [Mother's] care right now?" Reverend Spears responded, "No." *Id.* at 270.

Based on the foregoing, we conclude that the juvenile court's judgment is supported by clear and convincing evidence. As previously stated, a trial court must judge a parent's fitness to care for his or her child at the time of the termination hearing, taking into consideration the parent's *habitual patterns of conduct* to determine the probability of future neglect or deprivation of the child. *D.D.*, 804 N.E.2d at 266. Thus, in the present case, the juvenile court had the responsibility to judge Mother's credibility and weigh her testimony of changed conditions against the evidence demonstrating Mother's habitual pattern of conduct in failing to remain drug-free, in failing to obtain stable housing and employment, and in failing to provide a consistently safe and nurturing environment for A.C. It is clear from the language of the judgment that the juvenile court gave more weight to evidence of the latter, rather than the former, which it was permitted to do. *See Bergman v. Knox County Office of Family & Children*, 750 N.E.2d 809, 812 (Ind. Ct. App. 2001) (concluding trial court was permitted and in fact gave more weight to abundant evidence of mother's pattern of conduct in neglecting her children during several years prior to the termination hearing than to mother's testimony that she had changed her life to better accommodate the children's needs). Mother's argument on appeal amounts to an invitation to reweigh the evidence, and this we may not do. *D.D.*, 804 N.E.2d at 264; *see also In re L.V.N.*, 799 N.E.2d 63, 68-71 (Ind. Ct. App. 2003) (concluding that mother's argument that conditions had changed and that she was now drug-free constituted an impermissible invitation to reweigh the evidence).

We reverse a termination of parental rights “only upon a showing of “clear error” – that which leaves us with a definite and firm conviction that a mistake has been made.”” *Matter of A.N.J.*, 690 N.E.2d 716, 722 (Ind. Ct. App. 1997) (*quoting Egly*, 592 N.E.2d at 1235). We find no such error here.² Moreover, we are unwilling to put A.C. on a shelf until Mother is capable of caring for her appropriately. The approximate two years she has already waited is long enough. *See In re Campbell*, 534 N.E.2d 273, 275 (Ind. Ct. App. 1989) (stating that the Welfare Department does not have to rule out “any possibility” of change and concluding that approximately two years without improvement is “long enough”). Accordingly, the juvenile court’s judgment is hereby affirmed.

Affirmed.

FRIEDLANDER, J., and MAY, J., concur.

² Having concluded that the juvenile court’s determination that there is a reasonable probability the conditions resulting in A.C.’s removal from Mother’s care will not be remedied is supported by clear and convincing evidence, we need not address Mother’s arguments regarding the sufficiency of the evidence supporting the juvenile court’s determination that continuation of the parent-child relationship poses a threat to A.C.’s well-being. *See L.S.*, 717 N.E.2d at 209 (explaining that Indiana Code section 31-35-2-4(b)(2)(B) is written in the disjunctive).